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IN THE

Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP., ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF BP AMERICA PRODUCTION COMPANY, CHEVRON CORPORATION, AND SHELL OIL COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a *qui tam* relator under the False Claims Act, based on a misinterpretation of the statutory definition of an "original source" set forth in 31 U.S.C. § 3730(e)(4)?

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STATEMENT OF INTEREST*

Amici, BP America Production Company, Chevron Corporation, and Shell Oil Company, are three of the largest integrated energy companies in the world. *Amici*, or their affiliates, are engaged in every aspect of the oil and natural gas industry, including exploration and production; refining, marketing, and transportation; chemicals manufacturing and sales; and power generation. By virtue of their market position, *amici* frequently engage in contractual and other relationships with the United States government.

Amici have a particular interest in this case because they are among over forty energy industry defendants in a False Claims Act ("FCA") *qui tam* suit currently before the United States District Court for the Eastern District of Texas, captioned *United States ex rel. Wright, et al. v. AGIP Petroleum Co., et al.*, No. 5:03-CV-264-DF (E.D. Tex.). *Amici* and their co-defendants filed a motion to dismiss the *qui tam* relator's complaint for lack of subject matter jurisdiction under the public disclosure bar of 31 U.S.C. 3730(e)(4)(A). The defendants argued that the relator did not qualify as an "original source" under 31 U.S.C. 3730(e)(4)(B), because the relator had never been employed by any of the defendants or any other major oil company, had no personal or inside knowledge of how any defendant processes, transports, or markets its gas or natural gas liquids ("NGLs") produced from federal leases, no knowledge of the federal rules and regulations governing the payment of federal royalties, and no idea how any defendant calculates or pays royalties to the federal government on gas and

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* No party other than the *amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have granted consent to the filing of this *amicus curiae* brief. Letters of consent are on file with the Clerk of the Court.

NGLs. In short, the relator had no firsthand, factual knowledge of any kind about the dealings between *amici*, their co-defendants, and the United States that are the subject of the pending *qui tam* suit.

The district court, however, denied the motion to dismiss. *United States ex rel. Wright v. AGIP Petroleum Co.*, No. 5:03-CV-264-DF, slip op. (E.D. Tex. Jan. 4, 2005).[1] The court concluded that the relator's background personal experience owning private gas royalty interests in private wells not on federal lands allowed him to determine that several defendants were paying him royalties based on prices below market value. *Id.* at 27-28. The court also found that the relator's experience of many years working in the industry gave him "insider knowledge of industry practice as it relates to the payment of gas royalties," *id.* at 34, and that "[f]rom this insider knowledge, Wright acquired direct and independent knowledge of the material elements of the alleged fraud in this case." *Id.* In particular, Wright's "experience . . . that [royalty owners] paid everybody on the same basis," *id.* at 29 (internal quotation marks omitted), allowed Wright to assert that if he was being underpaid on his leases, the United States likely was being underpaid in the same way. *Id.* at 29-31. For these reasons, the court concluded, the relator satisfied the "original source" requirements of 31 U.S.C. § 3730(e)(4)(B).

The *Wright* case highlights a threshold issue of substantial importance, which *amici* believe this Court should consider as it answers the question presented in the petition. The petition requires the Court to clarify the nature of the information which a relator must have to be an "original source," and to resolve a circuit split focused in part on whether that information must include knowledge of the

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[1] Given that this decision is unpublished and unavailable in electronic databases, all citations are to the slip opinion.

fraudulent acts themselves. The threshold issue raised in the *Wright* case, and which is inherent in the task of clarifying what it takes to be an "original source," is whether, at a minimum, "direct and independent knowledge of the information on which the allegations are based," 31 U.S.C. § 3730(e)(4)(B), must be firsthand, factual knowledge by the relator *about* the dealings between the defendant and the government that make up the subject matter of the FCA lawsuit, or whether, as the *Wright* court held, theories and speculation based on a relator's experiences completely unrelated to the dealings between the defendant and the government can suffice.

SUMMARY OF ARGUMENT

Amici offer this brief to support the modest proposition that, whatever the precise extent of the "original source" provision's "direct and independent knowledge" requirement may be, it is not satisfied by a person who has no firsthand, factual knowledge whatsoever of the relationship and transaction between the defendant and the government from which the underlying FCA lawsuit's claims arise.

ARGUMENT

This Court granted certiorari to determine whether the Tenth Circuit erred by "misinterpret[ing] the statutory definition of an 'original source.'" Pet. i. Thus, the Court has undertaken the task of construing the statutory language of the "original source" requirement. That requirement, when satisfied, allows a relator to proceed with litigation under the FCA—even if the United States elects not to do so—and to receive a share of any recovery and attorneys fees. *See* 31 U.S.C. § 3730(a)-(d). As relevant here, the FCA provides that an "original source" is "an individual who has direct and independent knowledge of the information on

which the allegations are based." 31 U.S.C. § 3730(e)(4)(B).[2]

The petition presents the Court with a split among the circuits concerning the proper interpretation of these words, and more specifically a circuit split on the question of what information a relator must know and disclose to the government. Pet. 13-14. The Third and Eleventh Circuits require knowledge of the fraudulent statement; the Eighth and D.C. Circuits require knowledge sufficient to show that the statement is false; the Ninth Circuit evaluates whether the relator's information proximately caused the discovery of the fraud; and the Tenth Circuit, in this case, requires only that a relator know background information "underlying or supporting" his supposition that a defendant might have engaged in fraud, even if the relator pursues a different theory at trial. *See* Pet. 5, 14-15; Pet. App. 21a (holding that § 3730(e)(4) merely requires relators to know facts "underlying or supporting" the "fraud allegations contained in the plaintiff's *qui tam* complaint").

In determining the character of the "direct and independent knowledge" that an "original source" must have, there is a threshold question of whether at a minimum—and however the Court may ultimately resolve the question whether knowledge of the fraud itself is required—the "direct and independent knowledge" that a relator must possess must be firsthand, factual information about the dealings between the government and defendant that are the subject matter of the FCA suit. *Amici* contend that it is not enough for a would-be relator with no direct knowledge about the facts of the allegedly fraudulent relationship or events set out in the complaint to offer

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[2] The statute also requires that a relator must have "voluntarily provided the information to the government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

speculation or theories to the effect that government fraud might be afoot. Nor is it enough that such speculation or "tips" to the government rest on the relator's own firsthand experience, where that experience has nothing to do with the interactions between the defendant and the government that are the subject matter of the FCA suit.

This requirement of firsthand, factual knowledge about the events that are the subject matter of the suit—and thus of the relevant dealings between the defendant and the government—is fundamental. Moreover, it logically precedes the question of whether this factual knowledge must extend to the fraud itself, or may suffice if it does not.

As set forth below, *amici*'s assertion that the statute's "original source" exception reserves that special status to persons with "direct and independent knowledge" about the facts of the case at issue is compelled by the plain meaning of the provision itself. Honoring that plain meaning is, in turn, of critical importance in realizing the statute's dual objectives of creating incentives so that genuine "whistleblowers" come forward, while denying those incentives to gold diggers who have no firsthand, factual knowledge of the events at issue, but try nonetheless to seek bounties through lawsuits brought in the name of the United States. Failure to clarify this threshold requirement of the "original source" rule would severely impair the ability of lower courts to serve as gatekeepers of FCA litigation, and leave unresolved an important question of federal court jurisdiction.

I. THE PLAIN LANGUAGE OF THE "ORIGINAL SOURCE" EXCEPTION TO THE PUBLIC DISCLOSURE BAR REQUIRES A RELATOR TO HAVE FIRSTHAND, FACTUAL KNOWLEDGE ABOUT THE INTERACTIONS BETWEEN THE DEFENDANT AND THE GOVERNMENT THAT ARE THE SUBJECT OF THE FCA SUIT

The FCA empowers individuals to originate and pursue litigation in the name of the United States alleging fraudulent conduct against it. *See* 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of § 3729 for the person and for the United States Government."); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 941 (1997). It contains complex procedures to ensure that the government is afforded an opportunity to review and, where it wishes to do so, take control of any such litigation. *See* 31 U.S.C. § 3730(b)(2) (requiring, among other things, that a relator file a complaint under seal "for at least 60 days" and prepare and serve on the government a "written disclosure of substantially all material evidence and information the person possesses"). And the FCA also contains a flat bar to jurisdiction over a relator's action where there has been a public "disclosure of allegations or transactions" in various judicial, administrative, congressional, or other public fora. 31 U.S.C. § 3730(e)(4)(A). But in the provision whose precise meaning is at issue in this case, there is a limited exception to this absolute bar for persons who are "original source[s]" of the "information on which the allegations are based," who are allowed to proceed under the FCA notwithstanding a previous public disclosure. 31 U.S.C. § 3730(e)(4)(B).

The language of § 3703(e)(4)(B), while less than elegant, is clear beyond peradventure in establishing that, to qualify as an "original source," a relator must have firsthand, factual knowledge about the dealings between the defendant and the government that are the subject matter of the FCA suit. For, § 3730(e)(4)(B) defines an "'original source' . . . [as] an

individual who has direct and independent knowledge of the information on which the allegations are based." *Id.*

The public disclosure bar to jurisdiction over an FCA suit against the defendant is only triggered when the suit is "based upon the public disclosure of allegations or transactions" in one of various enumerated proceedings. 31 U.S.C. § 3730(e)(4)(A). In creating in the next sentence an "original source" exception, Congress was clearly saying that an "original source" must have the specified knowledge concerning "allegations" that were publicly disclosed. *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) ("'allegations' referred to in subparagraph (B) can only mean those allegations publicly disclosed, since those are the only allegations mentioned at all in section 3730(e)(4)"); *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 353-54 (5th Cir. 2003) (same). From the context, it is clear that these are the factual allegations against the defendant that are involved in the lawsuit. *See United States v. New York Med. Coll.*, 252 F.3d 118, 121 (2d Cir. 2001) (holding that a relator must be the "'source of the core information' upon which the *qui tam* complaint is based") (citation omitted); *United States ex rel. Mistick PBT v. Hous. Auth. of City of Pittsburgh*, 186 F.3d 376, 388-89 (3d Cir. 1999) (Alito, J.) (same).

Furthermore, the requirement of "direct and independent knowledge" relating to those allegations is a requirement of firsthand knowledge. *See, e.g., United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003) ("a relator has direct knowledge when he sees it with his own eyes"), *cert. denied*, 540 U.S. 1105 (2004); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992) (same). Thus, it is not enough for a relator to bring a lawsuit predicated entirely on secondhand and thirdhand reports from others of the events that are the subject matter of the suit. *See, e.g., United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) ("A person who learns

secondhand of the allegations of fraud does not have 'direct' knowledge within the meaning of [the FCA]."); *Laird*, 336 F.3d at 355 (same).

The split in the circuits that brought this case before the Court relates essentially to how much *firsthand* knowledge of the *allegations against the defendant* a relator must have to be an "original source." Must the relator be specifically aware of the fraud itself, or will some lesser quantum and character of firsthand knowledge—perhaps even just background information about the relationship between the defendant and the United States—suffice? While Petitioners and other *amici* offer strong reasons for concluding that the firsthand knowledge should be required to pertain to the gravamen of the wrong—that is the fraud itself—*amici* in this brief confine themselves to highlighting a more modest, but critically important point: One can not possibly have "direct and independent knowledge" of the lawsuit's "allegations" against the defendant unless he has *some* firsthand knowledge of the facts relating to the dealings between the defendant and the government that is the subject of the suit.

There is no reasonable contrary interpretation of the "original source" exception. To read "allegations" as a term divorced from that baseline requirement of firsthand, factual knowledge strips the term of meaning and causes the "original source" exception to swallow the public disclosure bar. Yet this is precisely what some courts—including the Tenth Circuit in the *Rockwell* case at bar and the district court in *amici*'s *Wright* case—have done. They have interpreted the exception so broadly as to allow mere speculation or general industry background knowledge to trigger the exception, even though the putative relator admittedly has no firsthand, factual knowledge whatsoever of the specific relationship or transactions with the government out of which the alleged fraud arose. The plain language of the statute clearly forecloses such an interpretation, and *amici* respectfully request that the Court

affirm that fundamental point in order to prevent further confusion (and unnecessary litigation and expense) in the lower courts.

II. THE OVERALL STRUCTURE AND PURPOSES OF THE FCA ARE CONSISTENT WITH THIS LITERAL READING OF THE "ORIGINAL SOURCE" EXCEPTION AS CONFINED TO INDIVIDUALS WITH FIRSTHAND, FACTUAL KNOWLEDGE OF EVENTS THAT ARE THE SUBJECT OF THE FCA SUIT

The FCA's *qui tam* provisions are animated by two competing concerns. On the one hand, Congress has promoted private citizen involvement by establishing provisions which enable "whistleblowers" to help the government ferret out fraud. *See, e.g., United States ex rel. Biddle v. Bd. of Trs. of Leland Stanford, Jr. Univ.*, 161 F.3d 533, 539 (9th Cir. 1998) ("Insiders who have no duty to disclose fraud, *i.e.*, who do so voluntarily, should be encouraged to take 'significant personal risks to bring such wrong-doing to light,' and should be rewarded for doing so."); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005) (same).

On the other hand, Congress has sought to prevent opportunistic relators who add nothing to the exposure of the government fraud from joining in the government's recovery. *See Wang*, 975 F.2d at 1419 ("*Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot.").

The statute's provisions authorizing and creating substantial incentives for whistleblower lawsuits—including authorizing go-it-alone litigation in the name of the United States, and recovery of a substantial share of any award and attorneys fees—are well-known and do not require detailed discussion here. *See* 31 U.S.C. § 3730(a)-(d). But it is worth noting that the affirmative purpose of these provisions is not

an unqualified one to offer this opportunity and incentive to all litigation entrepreneurs wishing to try their hand at bringing a claim for fraud allegedly perpetrated against the United States. Even before the addition of the present public disclosure bar's "original source" provision, during the consideration of the legislation in 1986, the legislative history made clear that it was persons with knowledge—genuine "whistleblowers"—not speculators about possible fraud, whom the statute sought to encourage. "The proposed legislation seeks . . . to encourage any individual *knowing of Government fraud* to bring *that information* forward." H.R. Rep. No. 99-660, at 22 (1986); S. Rep. No. 99-345, at 2, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-67 (emphases added).

The public disclosure bar of § 3730(e)(4), coupled with its "original source" exception, attempt to balance the goals of "avoidance of parasitism and encouragement of legitimate citizen enforcement actions." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). There is usually no need for a private person to "blow the whistle" once the substance of the case against a defendant has been publicly disclosed, and thus the general rule is that jurisdiction is denied once a public disclosure has occurred. *See, e.g., United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997); *Findley*, 105 F.3d at 690. The public disclosure bar thus reflects the conclusion that the goals of the FCA are largely achieved when the factual information of a defendant's misconduct has been brought to light by a public disclosure.

The "original source" exception to this bar recognizes, most obviously, that the statute's very objective of encouraging people possessing factual information about government fraud to come forward would be frustrated if the public disclosure bar meant that the person who made the disclosure possible lost any claim to rights under the FCA. Sometimes a relator is the source of the information that is

publicly disclosed, thus revealing the fraud at issue. Where that occurs, a rule which would deny the "whistleblower" any rights to participate under the FCA could cause the relator to be less than forthright in his disclosures, or to avoid the whole risky enterprise of acting as a "whistleblower" in the first place.

In pursuit of these concerns, then, Congress adopted the "original source" provision as a limited exception to the public disclosure bar.[3] As the principal Senate author of this provision noted, "[t]his amendment seeks to assure that a *qui tam* action based solely on public disclosures cannot be brought by an individual with no direct and independent knowledge of the information or who had not been the original source to the entity that disclosed the allegations." 132 Cong. Rec. S11238-04, S11244 (daily ed. Aug. 11, 1986) (statement of Sen. Grassley); *see also* Robert S. Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions under the False Claims Act*, 24 PUB. CONT. L.J. 237, 280-81 (1995) (noting that under Congress's "original source" directive a "relator who provides the Government with information prior to its publication should be rewarded for incurring the risk associated with breaking the conspiracy of silence, while the relator who incurs no risk in disclosing information because it is already public is appropriately penalized because his action does not benefit the Government").

If both of Congress's goals are to be realized in litigation under the FCA, there must be effective enforcement of the jurisdictional limitation embodied in the public disclosure

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[3] As this Court has explained, "[p]rior to 1986, such suits were barred if the information on which they were based was already in the Government's possession." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 941 (1997).

bar and "original source" exception. Obviously, then, the "original source" provision must be given a definite meaning capable of application by the courts, and it must be the one conferred by the words Congress used. As shown above, those words, while not elegant, are perfectly clear in their meaning in limiting "original source[s]" to participants or observers who possess at a minimum some firsthand, factual knowledge of the events surrounding the fraud. This meaning is entirely sensible, since such people are the ones who can provide the government assistance in investigating and prosecuting the fraud (for example, by acting as witnesses at trial) in a way that possessors of secondhand information cannot. *See* Salcido, *supra*, at 280-81 (noting that relators with direct information are likely witnesses, while those with only indirect, *i.e.*, hearsay information, are less likely to be valuable witnesses).[4]

III. LIMITING THE "ORIGINAL SOURCE" PROVISION TO PERSONS WITH FIRSTHAND, FACTUAL KNOWLEDGE OF THE EVENTS GIVING RISE TO THE FRAUD IS ESSENTIAL TO THE GATEKEEPING FUNCTION PERFORMED BY THE COURTS UNDER THE FCA

As this Court has emphasized, "[c]ourts and litigants are best served by [a] bright-line rule" in matters involving jurisdiction. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). "[C]lear, bright-line [jurisdictional] rule[s] . . . ensure[] that judges and litigants will not waste

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[4] This interpretation is also most likely to bring "wrongdoing to light" since, by barring those who come forward only *after* public disclosure of possible FCA violations from acting as *qui tam* plaintiffs, it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time.

their resources determining the extent of federal subject-matter jurisdiction." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring). The reason for this, as then-Judge Roberts has recently emphasized, is that "bright-line rules . . . can be applied to determine jurisdiction with a fair degree of certainty from the outset." *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 683 (D.C. Cir. 2003) (Roberts, J.). And courts "must not give jurisdictional statutes a more expansive interpretation than their text warrants." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2620 (2005). In light of this, the Court must clarify that the "original source" provision is not satisfied by a person who has no firsthand, factual knowledge whatsoever of the relationship and transaction between the defendant and the United States out of which the FCA lawsuit's claims arise. This clarification is urgently needed so that the lower courts faithfully implement the gatekeeping function that Congress has mandated through the statutory language.

As shown above, in enacting the public disclosure bar and the "original source" exception, Congress clearly intended to provide "whistleblowers" with meaningful incentives to come forward while also erecting a jurisdictional barrier against opportunistic relators. In creating this jurisdictional bar, Congress enlisted the federal courts as gatekeepers to screen out unworthy *qui tam* actions and advance the purposes of the FCA. Unfortunately, confusion over the "original source" exception serves to thwart the courts' gatekeeping function by allowing opportunistic *qui tam* suits to proceed at great expense to litigants, the courts, and, ultimately, the government.

Clear guidance anchored in the statutory language is important to the courts' gatekeeping function because the FCA is frequently litigated. Since Congress amended the Act in 1986 to allow a relator to proceed even after a public disclosure, the federal courts have entertained over 5000 *qui tam* suits. United States Government Accountability Office,

No. GAO-06-320R, "Information on False Claims Act Litigation," at 25 (2006), *available at* http://www.gao.gov/new.items/d06320.pdf (last visited Oct. 26, 2006). The number of *qui tam* cases filed each year has increased dramatically from a low of 33 in 1987 to a current estimated rate of 300 to 500 each year. *See* Statistics Under the *Qui Tam* Provision of the False Claims Act Amendment of 1986 (Dep't of Justice, Sept. 30, 2002), *reprinted in* 2 JOHN T. BOESE, CIVIL FALSE CLAIMS & QUI TAM ACTIONS, at App. H (2006 Supp.). The "original source" question arises in a significant percentage of these cases and "has become (along with 'public disclosure') the most litigated—and confused—issue under the *qui tam* provisions." 1 BOESE, *supra*, § 4.02[D].

Courts that misapply the "original source" exception undermine the judicial gatekeeping function, thereby eviscerating Congress's intent with respect to the FCA. Perhaps the most significant consequence of the existing confusion over the "original source" exception is the possibility of monetary awards to opportunistic relators, which can be quite substantial and come directly out of the monies ultimately awarded to the government. *See* 31 U.S.C. § 3730(d)(1).

Furthermore, judicial uncertainty over the original source exception imposes substantial costs on litigants and the courts aside from the windfalls described. While the extent of resources thus wasted is not easily determined, when one considers the precious time of the courts, the commitment of government resources to coordinate with counsel of improper relators and to monitor suits in which the government has not joined, and of course the substantial costs of defending against these high-exposure cases, the amount at issue is quite substantial.

For this reason, as well, in its consideration of the matter before it and of the precise character of knowledge required to be an "original source," the Court should make clear that

the "original source" provision requires firsthand, factual knowledge of events that are the subject of the FCA suit.

CONCLUSION

For these reasons, *amici* respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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